

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CASEY CUNNINGHAM, CHARLES E.  
LANCE, STANLEY T. MARCUS, LYDIA  
PETTIS, and JOY VERONNEAU, individually  
and as representatives of a class of participants  
and beneficiaries on behalf of the Cornell  
University Retirement Plan for the Employees of  
the Endowed Colleges at Ithaca and the Cornell  
University Tax Deferred Annuity Plan,

Plaintiffs,

16-cv-6525 (PKC)

-against-

ORDER

CORNELL UNIVERSITY, THE RETIREMENT  
PLAN OVERSIGHT COMMITTEE, MARY G.  
OPPERMAN, and CAPFINANCIAL  
PARTNERS, LLC d/b/a/ CAPTRUST  
FINANCIAL ADVISORS,

Defendants.

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CASTEL, U.S.D.J.

The strident tone of Mr. Rohlf's January 28, 2019 letter (Doc 245) on behalf of plaintiffs, accusing defendants of a "flagrant and inexcusable" violation of the undersigned's Individual Practices, would be more forgivable, perhaps, if it were correct in the position asserted. The purported violation by defendants is the failure to submit a pre-motion letter before the filing of the motions to exclude the testimony of four witnesses. But this Court entered an Order in this action, thereby superseding the Individual Practices, that provides as follows: "Any motions in limine shall be filed after the close of discovery and before the Final Pretrial Submission Date, and the pre-motion conference requirement is waived for any such motion." (Order of Dec. 4, 2017 at ¶11; Doc 116.) The instant motions to exclude testimony of certain witnesses are in the nature of in limine motions, as

the letter appears to concede (Doc 245 at 1.) Plaintiffs may wish to engage in an extended debate over the clarity of the Order or its ability to supersede the Individual Practices but defendants' actions are hardly "flagrant and inexcusable."

If plaintiffs wish to avoid briefing the motions to exclude at this time, all their lawyer need do is write and explain that plaintiffs have no intention of relying on any of these four experts in opposition to summary judgment and the Court will reset the briefing for a later time. But if plaintiffs intend to rely on any of them, then one might reasonably inquire whether the letter of January 28 is a sharp bit of advocacy in not coming right out and disclosing this rather than making oblique references to denying "summary judgment without even reaching expert opinion." (Doc 245 at 2.) Do plaintiffs seriously want to argue that the best time to decide whether an affidavit in opposition to summary judgment contains admissible evidence is after the Court has decided the motion for summary judgment relying on that affidavit?

Motion (Doc 245) is DENIED.

SO ORDERED.



P. Kevin Castel  
United States District Judge

Dated: New York, New York  
January 29, 2019